No. 07-362

In The
Supreme Court of the United States

TEEN RANCH, INC., MATTHEW KOCH and MITCHELL KOSTER,

Petitioners,

v.

MARIANNE UDOW, MUSETTE MICHAEL and DEBORA BUCHANAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal and Michigan laws permit faith-based providers of social services to retain their religious character, allow recipients of those services to choose not to be served by such providers, and prohibit discrimination against faith-based providers on the basis of their religious character. Teen Ranch is a Christian residential program for troubled teens and has received referrals from Michigan for over 35 years. Claiming authority to do so under *Locke v. Davey,* 540 U.S. 712 (2003), the Defendants, then called the Michigan Family Independence Agency ("FIA"), disqualified Teen Ranch from referrals because it incorporates religious content into its program.

The questions presented are:

1. Did the Sixth Circuit err in holding, in conflict with *Locke*, that a state official can require a faith-based provider of social services, which is not a seminary, to forfeit its religious beliefs and practices before it can participate in a government program, when the applicable state and federal legislation have expressed a directly opposite intent?

2. Did the Sixth Circuit err in holding, in conflict with the Seventh Circuit's opinion in *Freedom From Religion Foundation v. McCallum*, 324 F.3d 880 (7th Cir. 2003), that an individual's right to veto a religious placement, and thus be assured a secular placement, is not sufficient to make placement a private choice for Establishment Clause purposes?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state that they have no parent companies or non-wholly owned subsidiaries.

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OPINIONS BELOW

The decision of the United States District Court for the Western District of Michigan, Southern District, is reported at 389 F. Supp. 2d 827 (W.D. Mich. 2005), and attached at Appendix ("App.") 18. The panel decision of the Sixth Circuit affirming the District Court opinion is reported at 479 F.3d 403 (6th Cir. 2007), App. 1. The denial of Plaintiff's petition for rehearing and suggestion for rehearing en banc is not reported. App. 54.

JURISDICTION

The Sixth Circuit entered its order upholding the ruling of the District Court on January 17, 2007. Plaintiffs filed for en banc review, which was denied on June 15, 2007. App. 54. This Court has jurisdiction to review this decision under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United Sates and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The relevant federal law, 42 U.S.C. § 604a, states, in part:

> (b) Religious organizations
>
> The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2) of this section, on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.
>
> (c) Nondiscrimination against religious organizations

In the event a State exercises its authority under subsection (a) of this section, religious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in subsection (a)(2) of this section so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in subsection (k) of this section, neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character.

(d) Religious character and freedom

(1) Religious organizations

A religious organization with a contract described in subsection (a)(1)(A) of this section, or which accepts certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B) of this section, shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

(2) Additional safeguards

Neither the Federal Government nor a State shall require a religious organization to –

(A) alter its form of internal governance; or

(B) remove religious art, icons, scripture, or other symbols;

in order to be eligible to contract to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, funded under a program described in subsection (a)(2) of this section.

(e) Rights of beneficiaries of assistance

(1) In general

If an individual described in paragraph (2) has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program described in subsection (a)(2) of this section, the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization.

(2) Individual described

An individual described in this paragraph is an individual who receives, applies for, or requests to apply for, assistance under a program described in subsection (a)(2) of this section.

Michigan Public Act 172 states:

(1) In contracting with faith-based organizations for mentoring or supportive services, and in all contracts for services, the department shall ensure that no funds provided directly to institutions or organizations to provide services and administer programs shall be used or expended for any sectarian activity, including sectarian worship, instruction, or proselytization.

(2) If an individual requests the service and has an objection to the religious character of the institution or organization from which the individual receives or would receive services or assistance, the department shall provide the individual within a reasonable time after the date of the objection with assistance or services and which are substantially the same as the service the individual would have received from the organization.

(3) The department shall ensure that faith-based organizations are able to apply and compete for services, programs, or contracts that they are qualified and suitable to fulfill. The department shall not disqualify faith-based organizations solely on the basis of the

religious nature of their organization or their guiding principles or statements of faith.

(4) The department shall follow guidelines related to faith-based involvement established in section 104 of title I of the personal responsibility and work opportunity reconciliation act of 1996, Public Law 104-193, 42 U.S.C. § 604a.

2003 Mich. Pub. Acts 775.

STATEMENT OF THE CASE

A. Facts

1. History of Federal and State Laws Regulating Michigan's Residential Care Program

In 1996, Congress enacted, and President Clinton signed into law, significant "Charitable Choice" legislation. 42 U.S.C. § 604a ("The Federal Law"). The Federal Law's stated intent is to permit states to contract with faith-based organizations ("FBOs") to provide various social services without requiring the organizations to compromise their religious character. 42 U.S.C. § 604a(b). This character specifically includes an FBO's right to control the "practice and expression of its religious beliefs." 42 U.S.C. § 604a(d)(1).

To comply with the Establishment Clause, the Federal Law grants recipients of state-funded support the right to refuse placement with FBOs to

which they have a conscientious objection, and to demand re-placement should they find themselves at an FBO to which they object. 42 U.S.C. § 604a(e)(1). It also prohibits states from discriminating against religious organizations on the basis of their "religious character," as defined above. 42 U.S.C. §§ 604a(c) and (d)(1).

Each year since 2001, Michigan has expressly incorporated the Federal Law by reference in each of its annual appropriation statutes for the Michigan Family Independence Agency ("FIA"). These appropriation statutes are collectively called "the Public Act." The Public Act states:

> The department shall follow guidelines related to faith-based involvement established in section 104 of title I of the personal responsibility and work opportunity reconciliation act of 1996, Public Law 104-193, 42 U.S.C. § 604a.

App. 8.

Like the Federal Law, the Public Act also provides an opt-out clause for any ward who "has an objection to the religious character of the institution or organization from which the individual receives or would receive services or assistance. . . ." *See id.* at (2). Consequently, if a state official recommends placing a ward at a religious facility, such as Teen Ranch, then the ward has the statutory right to reject that placement, both before and during the ward's stay at Teen Ranch.

2. Facts Relating to the FIA's Residential Care Program

The FIA is responsible to provide care and supervision for children who have been committed to or placed in its care through state courts. Each ward is assigned both a caseworker and a lawyer/guardian ad litem ("GAL") to counsel the ward and advocate for the ward. The FIA contracts with 96 private organizations to provide residential youth rehabilitation services ("youth services"). At least 35 of the providers are faith-based organizations. But only Teen Ranch included religious activities in its program. All programs are essentially round the clock in nature. Hence, there is no "separate time and place" available to sequester religious activities. All are paid on a per diem, per capita basis, as opposed to block grants. Hence, they are paid only for the services they perform for wards who are housed with them.

FIA uses a computerized grid to determine what FIA claims is the "best" placement for the child. The computer system considers the child's history and other information to identify the treatment needs, and generates a series of proposed placements "ranked" in descending order of preference. No evidence has been put forward to establish that any second or third choice is substantially inferior to the computer's first choice. Moreover, the FIA does not track, nor does the computer consider, the effectiveness of the various facilities, nor their relative economy. Religion is not a factor in the computerized grid, nor the placement process. FIA is not required to

insist on the computer's first choice of placements for their wards. Hence, this entire procedure is essentially voluntary on FIA's part.

3. History of Teen Ranch and its Program

Teen Ranch has provided licensed residential services for delinquent, neglected, abused, and emotionally troubled youth between the ages of 11 and 17 since 1966. It has openly advertised its religious orientation and has unapologetically incorporated religious programming into the services it provides. Teen Ranch, by Board approved policy, does not mandate participation in any religious-themed activity.

4. FIA's Imposition of a Moratorium Upon Teen Ranch.

In October 2003, FIA conducted a "Quality Assurance Review" ("QAR") of Teen Ranch. The QAR unveiled areas of alleged noncompliance, of which all but the religious program at Teen Ranch were resolved by the end of 2003, and are thus irrelevant. On November 6, the FIA sent a letter to Teen Ranch outlining "violations of particular significance" and issued a moratorium on further placements. Among these "violations" was the incorporation of religious activity in the Teen Ranch program.[1] On December

[1] The QAR also included unsubstantiated allegations that Teen Ranch coerced roughly ten wards into participating in

(Continued on following page)

16, FIA sent a letter to Teen Ranch, stating, "It is not only improper to force youth to participate in religious practices, but it is also improper to incorporate religious teachings into the on-going daily activities of youth and their treatment plans." App. 4. On December 17, a meeting was held between the parties where Teen Ranch maintained its position of incorporating its religious beliefs into its youth services on a voluntary basis. In response to FIA's request to discontinue all religious activities, Teen Ranch issued the following statement:

> The mission statement of Teen Ranch states, "providing hope to young people and families through life changing relationships and experiences from a Christian perspective." This mission, and our interpretation of this mission, will not change, be sacrificed, nor will it be compromised.
>
> Teen Ranch, as policy, does not "force" youth to attend religious services, although it is encouraged and we believe to be part of an effective treatment program. Alternatives are provided for the children who wish not to attend religious services, such as a personal academic study time (if desired), letter writing

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religious activities. At no time in the next six months did FIA remove any of the allegedly offended wards, notify them or their caseworkers and lawyer/GALs of their statutory rights to demand relocation to a secular program, or tell Teen Ranch which wards objected to the religious programming. Instead, FIA demanded the removal of all the religious programming at Teen Ranch.

> home, recreational time in the gymnasium, or watch television until the other youth return home.
>
> However, incorporating religious teachings into on-going daily activities of youth and their treatment plans touches at the core of why we were founded, why we are here today, and why we will continue to include such programming for children in our care.

App. 5.

On January 9, the FIA told Teen Ranch that faith-based "providers receiving federal funding may not incorporate sectarian worship, instruction, or proselytization into the daily treatment and service plan activities," (App. 6) and, concluded "if Teen Ranch is unwilling to modify its current practices regarding the imposition of its religious beliefs into the daily treatment and service plan activities, FIA is unable to approve the corrective action plan and rescind the moratorium." App. 6.

5. Teen Ranch Efforts to Avoid Litigation via Compliance with State and Federal Law, and FIA's Temporary Compliance with the Law

On several occasions, Teen Ranch pled with FIA to follow the above referenced laws and permit Teen Ranch to retain its religious character and still participate in the state's residential care program. On

January 21, 2004, Teen Ranch sent FIA a letter informing them of the Public Act and the Federal Law, and requested they abide by the laws. App. 6, 56. On January 30, Teen Ranch representatives met with FIA, presented them with the Public Act and the Federal Law, and invited FIA to join Teen Ranch in obeying these statutes. Teen Ranch even gave FIA disclosure documents detailing Teen Ranch's religious character to give to potential placements, and implement the federal and state "opt-out" rights.

On February 20, 2004, Teen Ranch filed suit and requested a TRO. On February 23, Teen Ranch filed a Motion for Preliminary Injunction. On February 23, 2004, in response to Teen Ranch's Motion for TRO and Preliminary Injunction, FIA lifted the moratorium and temporarily implemented the statutory practices Teen Ranch had urged at the January 31, 2004 meeting. App. 7. Wards were given notice of Teen Ranch's religious character and advised of their right to refuse placement at Teen Ranch. Two new youth agreed to enroll at Teen Ranch in the next month. In early April, 2004, after the District Court denied Teen Ranch a Preliminary Injunction, FIA reimposed the moratorium, and discontinued the above noted practice.

B. The District Court Opinion

The District Court correctly identified the controlling question in this case as "whether the ability of youth to opt out of the Teen Ranch program pursuant

to § 220(2) of the Public Act based on its religious character gives the youth true private choice so as to make the funding of the religious programs at Teen Ranch indirect rather than direct." *Teen Ranch*, 389 F. Supp. 2d at 834-35, App. 33. The District Court was "aware of no case that has examined the issue of whether an opt-out provision is sufficient to constitute 'true private choice.'" *Id.* at 836, App. 36. The court also mentioned that the wards' youth prevented them from exercising private choice involving religious matters. *See id.* at 837, App. 39. The District Court then held that FIA could not place youth at Teen Ranch without violating the Establishment Clause. *Id.*

Upon concluding that private choice did not exist, the District Court quickly dispensed with Teen Ranch's other claims. *See Teen Ranch*, 389 F. Supp. 2d at 838-42, App. 40-52. It relied upon *Locke* in concluding that FIA had the discretion to refuse to contract with an FBO until it purged itself of its religious character. *Teen Ranch,* 389 F. Supp. 2d at 831, App. 24. The court neither noted nor addressed the fact that both Congress and the Michigan Legislature expressed the opposite intent, i.e., to permit faith-based organizations to participate in residential care programs without sacrificing their religious character. Moreover, the court failed to note that *Locke* was, by the majority opinion's own words, limited to "the religious training of clergy." 540 U.S. at 722, n. 5. No one contends that Teen Ranch is a seminary.

C. The Sixth Circuit Opinion

The Sixth Circuit essentially adopted the District Court's opinion. "[T]he district court identified the applicable law at issue – § 220 of the Michigan State Appropriations Bill, 2003 P.A., 172 ('Public Act') – which governs contracts between the FIA and faith-based organizations and also instructs the FIA to follow the guidelines set forth in 42 U.S.C. § 604a." *Teen Ranch v. Udow,* 479 F.3d 403, 408 (6th Cir. 2007), App. 7-8. "The district court properly recognized that this case turns on whether the FIA's funding of Teen Ranch is indirect, rather than direct, because the funding is 'a result of the genuine and independent choices of private individuals.'" *Id.* at 408-409, App. 9-10, *quoting Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002).

After reiterating the District Court's opinion, the Sixth Circuit stated,

> [W]e believe that the district court was correct in reaching its conclusions and granting summary judgment in favor of the FIA. For the same reasons identified by the district court, we conclude that the opt out provision of the Public Act did not provide the children placed in the care of the FIA with "true private choice." Likewise, after carefully considering the applicable law, we also reject all five of Teen Ranch's arguments for the reasons articulated by the district court.

Teen Ranch, 479 F.3d at 410 (emphasis added), App. 13-14.

REASONS FOR GRANTING THE PETITION

This Court should grant review to enforce the proper understanding of *Locke*, to settle a circuit split between the Sixth and Seventh Circuits as to whether an "opt-out" is private choice, and to affirm that, consistent with this Court's holding in *Zelman,* adults can exercise private choice for minors for whom they are legally responsible.

In *Locke*, the Supreme Court upheld a Washington statute that prohibited state scholarships being issued to students studying for the clergy. The majority opinion limited the holding to state funding of *clerical* studies. The Court cautioned that the opinion should not be read to give the states broad discretion to discriminate based on their "philosophical preferences." *See* 540 U.S. 722, n. 5.

The Sixth Circuit erroneously expanded the holding in *Locke* well beyond these stated limits and, in so doing, held that state bureaucrats may disregard federal and state law and form First Amendment public policy based solely on personal preference. The decision below essentially grants bureaucrats virtually unlimited "play in the joints" to discriminate against religious organizations at will.

In so extending *Locke*, the Sixth Circuit trampled on the Free Exercise Clause. Prior to *Locke*, this Court's long-standing jurisprudence forbade targeting religious beliefs for negative discriminatory treatment. *See Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990);

Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987) (requiring students to choose between their religious beliefs and receiving a government benefit); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). *Locke* did not purport to disturb this settled norm, yet that is precisely what the court below has done.

In addition, this Court should settle the conflict between the Sixth and the Seventh Circuits as to whether an "opt-out" creates private choice. In *Freedom from Religion Foundation v. McCallum*, 324 F.3d 880 (7th Cir. 2003), a Wisconsin state agency placed parolees in a Christian half-way house that incorporated religion into its treatment program. As in this case, the parolee had the right to refuse the placement on religious grounds and demand an alternative. The Seventh Circuit affirmed that this right to reject the suggested placement created true private choice, and thus the Establishment Clause was satisfied (i.e., the aid to religion was "indirect"). *Id.* at 882.

The Sixth Circuit ignored *McCallum* and held the polar opposite. This Court should settle the conflict and rule that both an opt-out and a selection initiated by the individual achieve the same end. In both instances the individual cannot be coerced to accept religious programming, and the Establishment

Clause is satisfied. The method of assuring neutrality encoded in the Federal Law and Public Act, consistent with the plurality opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000), is to provide a system of private choice so that no government dollars go to a religious organization except in accordance with the private choice of an individual. An opt-out provision satisfies this concern.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH *LOCKE V. DAVEY* AND ESTABLISHED FREE EXERCISE JURISPRUDENCE.

FIA and both courts erroneously extended *Locke* far beyond and contrary to its stated limits and underlying rationale.

A. *Locke v. Davey*

In *Locke*, this Court upheld a Washington statute that prohibited state scholarships for students studying to become clergy. *See* 540 U.S. at 725. The holding was explicitly limited to the issue of funding for "the religious training of clergy." *Id.* at 722, n. 5, 722-24. The Court explained that this narrow decision reflected long-standing historical concerns over public funding of the clergy. It did not apply to general religious studies. In fact, the program in question "permitt[ed] students to attend pervasively religious schools, so long as they [were] accredited." *Id.* at 724.

In addition, this Court did not grant even state legislatures, much less state employees, permission to discriminate against religion based on their own "philosophical preferences." *See id.* at 722 n. 5. Nowhere were the "philosophical preferences" of state bureaucrats indulged or endorsed as legitimate "play in the joints." *Id.*

> Justice Scalia notes that the State's "philosophical preference" to protect individual conscience is potentially without limit, see *post,* at 1318; however **the only interest at issue here is the State's interest in not funding the religious training of clergy. Nothing in our opinion suggests that the State may justify any interest that its "philosophical preference" commands.**

Id. at 722 n. 5 (emphasis added).

Locke was thus fully consonant with this Court's earlier teaching expressed in *Zorach v. Clausen,* 343 U.S. 306 (1952), where Justice Douglas wrote for the majority:

> We sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs it follows the best of our traditions.

343 U.S. at 313-14; *see also Walz v. Tax Commission of City of New York,* 397 U.S. 664 (1970) (quoting the *Zorach* excerpt and using the phrase "play in the joints").

In *Locke,* the Court reaffirmed that governments have some "play in the joints" between the Free Exercise and Establishment Clauses. However, this Court was careful to clearly identify the unique circumstances at work in *Locke*. Both the FIA and the Sixth Circuit completely disregarded this cautionary limitation.

B. The Sixth Circuit Improperly Expanded *Locke*.

The Sixth Circuit cited *Locke* to excuse FIA's discrimination. As a result, the court below allowed state employees to override the express will of the state legislature, in an area that no one contends involves seminary training or some comparable historically rooted exclusion.

Two weeks after *Locke* was issued, FIA cited it to the District Court as justification for its discrimination against Teen Ranch. However, FIA's actions run directly contrary to the requirements of the Federal Law and Public Act, and represent, if anything, a species of "bureaucratic veto" nowhere endorsed in *Locke*. The Federal Law explicitly prohibits discrimination against religious organizations in contracting for social services programs. 42 U.S.C. § 604a(c). It permits FBOs to participate in publicly funded social

service programs without compromising their religious character.

> The purpose of this section is to allow states to contract with religious organizations . . . without impairing the religious character of such organizations.

42 U.S.C. § 604a(d)(1).

The law defines "religious character" to include the organization's "practice and expression of its religious beliefs." 42 U.S.C. § 604a(d)(1). The State of Michigan adopted the Federal law by reference, and directed FIA to implement these guidelines in all their dealings with faith-based organizations. *See Teen Ranch*, 479 F.3d at 408 (quoting the Public Act, section 220(4)), App. 8.

The philosophical preferences upon which FIA has acted are clearly contrary to these statutory policies. Debora Buchanan, the Manager for the Purchased Care Division for FIA, testified:

> My position right now today is that it is improper for the State of Michigan to contract with a provider who incorporates religious beliefs, practices, et cetera. . . .

App. 71.

Hence, Congress and Michigan gave FIA specific instructions to include openly religious organizations in eligibility for state contracts. *Contrary to Locke*, the bureaucrats in FIA simply disagreed.

It is uncontested that Teen Ranch confers no clerical degrees, nor is it in any way a seminary. While Teen Ranch is a religious organization, *Locke* does not endorse discrimination against even "pervasively religious" programs. 540 U.S. at 724; *see also Mitchell,* 530 U.S. at 809-10. Consequently, the Sixth Circuit misread *Locke*.

C. Without *Locke* as a Defense, the FIA's Actions Violate the Free Exercise Clause.

Absent the erroneously claimed endorsement of *Locke,* the actions of FIA plainly violate this Court's established jurisprudence regarding the Free Exercise Clause. This Court has never upheld state action that specifically targets religious beliefs for disparate treatment. *See Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Yet, this is exactly what FIA did to Teen Ranch, specifically targeting Teen Ranch's religious beliefs and mandating they cease practicing their religious beliefs before they can participate in the state's youth services program. App. 6.

II. THE SIXTH CIRCUIT'S OPINION ON PRIVATE CHOICE CONFLICTS WITH THE SEVENTH CIRCUIT'S OPINION IN *MCCALLUM.*

FIA and the lower court opinion contend that the statutes in question fail to accord private choice. The Sixth Circuit found that private choice was lacking on two counts. First, the court below held that the rights to reject placement at an FBO, and to demand relocation, fail to constitute genuine private choice, since the ward does not, as it were, "choose from a menu of options." This holding contradicts the Seventh Circuit in *Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003). Second, the court below held that the wards, as minors, were too young to exercise private choice, notwithstanding that each ward is assisted by parents and assigned a caseworker and lawyer/GAL as a matter of law to assist them. This holding runs counter to *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002).

A. Conflict with the Seventh Circuit's Decision in *McCallum*

In 2003, the Seventh Circuit held that a parolee's right to reject a parole officer's selection of a Christian half-way house for his parole house sufficed to create private choice. *Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003). On all relevant factual points, this case is indistinguishable from *McCallum.*

In *McCallum,* parolees were clearly under the jurisdiction of the state (Wisconsin). A state agent would review the parolee's *dossier* and personally select a halfway house to help transition the parolee back into society. The Seventh Circuit described the process as follows:

> If a convicted criminal is out on parole (or probation, but we need to discuss that separately) and living in Milwaukee and he violates the terms of parole, his parole officer may offer him, as an alternative to being sent back to prison, enrollment in one of several halfway houses. The officer can recommend a specific halfway house – the one he thinks best for the particular offender – but the offender is free to choose one of the others.

Id. at 881.

One of the facilities officers suggested was Faith Works, a Christian halfway house that incorporated Bible reading and similar devotional exercises in their daily programs. If the parole officer selected Faith Works, the parolee was entitled to reject placement if he/she objected to the religious programming. *See Freedom from Religion Foundation, Inc. v. McCallum*, 214 F. Supp. 2d 905, 910-11 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th Cir. 2003). In such a case, the agent was required to find a suitable secular house. The halfway houses, including Faith Works, were compensated under a per diem, per capita contract with the state, and were, in effect, paid only

for the specific parolees they served, while they served them.

The Seventh Circuit held that the parolees' right to reject a placement was sufficient to create private choice.

> The choice must be private, to provide insulating material between government and religion. It *is* private; it is the offender's choice.

Id. at 882. *See also Freedom from Religion Foundation, Inc. v. McCallum*, 179 F. Supp. 2d 950, 971 (W.D. Wis. 2002), *on reconsideration in part*, 214 F. Supp. 2d 905, 910-11 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th Cir. 2003) (explaining in detail the opt-out system permitting parolees to reject a placement to a religious half-way house initially suggested by the parole officer).

Thus, the Seventh Circuit found the state's placement process to be equivalent to the voucher program endorsed by this Court in *Zelman,* and concluded "there is no difference" between the practices of the Wisconsin correctional officers and the voucher system in *Zelman. See* 324 F.3d at 882. It held that the right to reject an undesired placement in a religious program is indistinguishable from the individual selecting from a "menu" without input from a state agent. Both are private choice.

In this case, the wards are under the jurisdiction of FIA, just as the Wisconsin parolees were under the jurisdiction of their state. In both, one facility is

available that incorporates religious activities in its program, and many others do not. In both, the state agent can or does initiate the placement process. In Wisconsin, the agency permits the parolee to reject the religious placement and choose another. In the present case, the Federal Law and Public Act both require that a ward who objects to Teen Ranch's religious character must be reassigned or relocated, yielding a placement that does not incorporate religion. 42 U.S.C. § 604a(e)(1); Public Act Section 220(2) and (4), App. 8-9.

Contrary to the Seventh Circuit, the Sixth Circuit held that the option to reject an unwanted placement did not suffice to create private choice. Rather, it endorsed the holding that, in order for true private choice to exist, the ward must select from a "menu" of choices. *See Teen Ranch*, 389 F. Supp. 2d at 836, App. 36 ("Although the children have the ability to opt out of a religious program, they do not have the ability to choose or reject a religious program from a menu of secular and religious programs").

B. The Seventh Circuit's Decision is More Consistent with Supreme Court Decisions.

The apparent rationale for the Sixth Circuit's decision is the ephemeral distinction between an individual affirmatively "selecting from a menu," versus an individual rejecting an unwanted placement. But as the Seventh Circuit held in *McCallum*,

there is no constitutional difference. By either means, any individual who desires a purely secular placement is guaranteed one. He either chooses it, or rejects a religious alternative. By either means, the recipient has the power to reject an unwanted religious placement. His placement coincides with his personal desire, and is, therefore, a genuine private choice. The Establishment Clause is satisfied. The state is neutral. No governmental endorsement of religion occurs.

The D.C. Circuit put the point succinctly in *American Jewish Federation v. Corporation for National and Community Service,* 399 F.3d 351 (D.C. Cir. 2005). When confronted with a similar objection that a majority of placements in a particular program were religious, and that the "choices" were "limited," the D.C. Circuit held:

> Of course the number of such opportunities is "limited." It could scarcely be unlimited. **The important points are** (1) there are a numerous AmeriCorps teaching positions in public and private secular schools; and (2) that there is no evidence of any participant who wanted to teach in a secular school, **but was impermissibly channeled** to a religious school.

399 F.3d at 358 (emphasis added).

To paraphrase the D.C. Circuit, it is immaterial whether the individual's state employed "waiter" gets to suggest an entree from a "menu." It only matters

that the waiter may not demand the individual accept his suggestion. Whether the absence of coercion is accomplished by the state-employed "waiter" standing mute or, as in our case, the applicable statutes requiring him to defer to the individual's objection, is, from the perspective of the Establishment Clause, immaterial. The *individual's* choice, the *private* choice, prevails in either event. The Seventh Circuit, in *McCallum,* reflects this logic. The Sixth Circuit, in this case, denies it. The essence of private choice is the absence of government coercion, not the mere formalism of who initiates a conversation leading to the placement. *See also McCallum*, 324 F.3d at 883 ("The plaintiffs argue that by recommending Faith Works to some offenders, parole officers steer the offenders to a religious program and by doing so provide governmental support to religion. The implications of the argument are unacceptable.")

Hence, just as *Mitchell* dispensed with the immaterial formalism of whether a voucher check was made out to the school or was endorsed over to the school by the student or his parents, it is immaterial in the context of private choice whether the placement results from an individual "choosing from a menu" or rejecting unwanted alternatives until one meets with his approval. *See* 530 U.S. at 793. In either event, it is the choice of the individual, not the will of the state, that determines the placement. This is private choice.

C. Prohibiting Minors from Exercising Private Choice through Adult Proxies Conflicts with *Zelman*.

The final basis upon which the Sixth Circuit ruled was the minority of the wards. The Sixth Circuit upheld the District Court ruling in that:

> **Regardless of whether state wards are particularly vulnerable, they are children.** The Court believes this fact cannot be ignored as the Court considers whether an opt-out provision is sufficient to make the ward's choice a "true private choice."

Teen Ranch, 389 F. Supp. 2d at 835, App. 34.

The lower courts cited to this Court's school prayer cases and, in particular, to language citing "heightened concerns" appropriate to the youth of school children. The courts did not discuss or opine as to why, given that each ward is attended to by a caseworker, a lawyer and, frequently, their parents, the private choice could not be exercised through any of these trained adults' mediation.

The court's holding at least implies that private choice may not be exercised by or for minors. This contradicts the decision in *Zelman* and is a complete misapplication of school prayer jurisprudence.

Zelman sustained a voucher program for parochial schools against an Establishment Clause challenge by finding that vouchers are an exercise of private choice. *See* 536 U.S. at 653. Obviously, the

students involved who would be attending the classes were minors enrolled in grades K-12. All or substantially all of them were enrolled in schools chosen for them by their parents or legal guardians. After reviewing this Court's "consistent and unbroken" chain of decisions on "true private choice," this Court reframed the issue in terms that inevitably dispel the notion that private choice cannot be exercised by youth or on behalf of youth by responsible adults.

> The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools.

Id. at 655-56.

Obviously, if private choice cannot be exercised by or for youths through the counsel and intercession of responsible adults, it would have been impossible for this Court to frame the issue as it did and to reach its ultimate holding:

> In sum, the Ohio program . . . permits such individuals to exercise genuine private choice among options public and private, secular and religious. The program **is therefore a program of true private choice**.

Id. at 662 (emphasis added).

With that, this Court reversed the Sixth Circuit and approved the Cleveland voucher program. Hence, *Zelman* decisively dispels the notion that private choice is impossible where the program beneficiary is a minor.

Zelman also illustrates the error of the lower court's invocation of the school prayer cases. Indeed, those decisions themselves illustrate their complete irrelevancy to private choice analysis. In none of these decisions did the term "private choice" even appear. In *Zelman,* none of these decisions were cited by the majority, and no justice writing a dissent argued that, owing to these decisions, private choice could not be exercised by or for minors by responsible adults. Hence, it is clear that considerations informing school prayer cases and the "heightened concerns" relative to youth cited by the Sixth Circuit are inapposite when considering a case of private choice.

Private choice can readily be exercised by youths, aided by responsible adults. In this case, it is uncontested that each ward has numerous trained adults assigned who are capable of serving this purpose. App. 20. No one has proffered any evidence to the contrary.

Moreover, the very nature of private choice demonstrates the irrelevance of the "heightened concerns" addressed in the school prayer cases. In all school prayer cases, a common fact was that, despite the alleged "voluntariness" of the religious observances under attack, it remained true that the objecting youth would remain enrolled in the same school, subject to questioning, peer pressure, and the like. Under the statutes in question here, the unwilling youth is relieved of the entire unwanted environment. The youth goes elsewhere, to a secular facility. Given that no other program in Michigan includes religious

activities, the objecting ward is guaranteed to be placed at an organization without such activities. Even if more facilities began to include religious features, the statutory rights are unlimited, such that the availability of a secular environment remains an absolute guarantee. Hence, unlike all the school prayer cases, Michigan wards who object to Teen Ranch's religiosity need never be at Teen Ranch, nor be subjected to any allegedly "coercive environment" that might exist there. Indeed, minors in this case actually enjoy *greater* free choice than the children in *Zelman*, who had no legal right to veto their parents' choices.

Consequently, the Sixth Circuit's final basis for denying Teen ranch the relief it seeks, the "youth exception" is, again, meritless.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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